

CONCERNS OVER THE RULE OF LAW AND THE COURT OF FINAL APPEAL IN HONG KONG

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I. INTRODUCTION

On Wednesday, July 12, 1995, for the first time in the 150-year colonial history of Hong Kong, the Hong Kong Legislative Council (Legco) voted on a motion of no-confidence against its British-appointed Governor, Chris Patten.¹ "If passed in a conventional parliament, such a motion would bring down the government."² However, the no-confidence motion had no binding effect on the Governor.³ Nonetheless, the Democratic Party, chaired by Martin Lee made the motion to indicate its stern disapproval over the agreement of the Court of Final Appeal (CFA) reached between Britain and the People's Republic of China (China) in June 1995.⁴ The motion was defeated by a two-to-one margin.⁵

Formal negotiations between Britain and China over the reversion of Hong Kong in 1997 from Britain to China began in the early 1980s. Criticism against the motivations, procedures, and outcomes of these negotiations has been abundant, but none has amounted to a formal objection as severe as a vote of no-confidence on the Hong Kong Governor himself. What is in the CFA agreement that triggered such a hostile response? Lee called the agreement a "landmark sellout, a landmark betrayal."⁶ Was it? Or did the agreement provide sufficient safeguards to ensure an independent judicial system and the continuation of rule of law in Hong Kong after 1997, as claimed by Barrie Wiggham, the Commissioner of Hong Kong Economic and Trade Affairs?⁷

The first part of this paper gives a brief background of Hong Kong as a British colony and its judicial system. Next, the sources and the events leading up to the CFA agreement is examined. Following this, is a description of the CFA agreement and three major controversial issues regarding the CFA. Next, a prediction about the independence and operation of the CFA is presented and finally, a summary is presented of the CFA issue in Hong Kong.

1. Martin Lee, *No Confidence in Hong Kong's Highest Court*, ASIAN WALL ST. J., July 12, 1995, at 10.

2. *Id.*

3. *Legco Supports Patten In Confidence Vote*, ASIAN WALL ST. J., July 13, 1995, at 8.

4. *Id.*

5. *Id.*

6. Peter Stein, *Hong Kong Court Pack Has Mixed Appeal*, ASIAN WALL ST. J., June 12, 1995, at 1.

7. Barrie Wiggham, *No Legal Vacuum in Hong Kong*, WASH. POST, Aug. 14, 1995, at A16.

II. BRIEF BACKGROUND OF HONG KONG AS A BRITISH COLONY AND ITS JUDICIAL SYSTEM

Hong Kong can be divided into three areas geographically: Hong Kong Island, the Kowloon Peninsula and the Stonecutters Island, and the New Territories which border mainland China. These three areas became British colonies at different times. When Britain defeated China at the end of the Opium War in 1842, China ceded Hong Kong Island in perpetuity to Britain in the Treaty of Nanking.⁸ Eighteen years later in 1860, more conflicts between Britain and China led to the signing of the Convention of Peking in which the Kowloon Peninsula and the Stonecutters Island were ceded to Britain, again in perpetuity.⁹ Nearly four decades later, based on the Convention of 1898, China agreed to lease the New Territories to Britain for a period of ninety-nine years, commencing on July 1, 1898.¹⁰ Therefore, the reversion of Hong Kong to China in 1997 technically concerns only the New Territories.¹¹ However, the three areas, "collectively referred to as 'Hong Kong,'" have since 1898 functioned "so interdependently as one economic unit that any partition would threaten the viability of the colony itself. Therefore, the transfer must include the entire territory."¹² Consequently, Hong Kong is used in this paper to refer to all three areas.¹³

After colonizing Hong Kong in 1842, Britain simply imported the bulk of the common law of England into Hong Kong.¹⁴ Hong Kong received its constitution, including primarily the Letters Patent and the

8. Nancy C. Jackson, *The Legal Regime of Hong Kong after 1997: An Examination of the Joint Declaration of the United Kingdom and the People's Republic of China*, 5 INT'L TAX & BUS. L., 379-80 (1987).

9. *Id.*

10. *Id.*

11. China basically considers all the three treaties mentioned above invalid because they are all "unequal treaties" signed when China was helpless against western aggression. Therefore, it can be said that China's position was that there was no need to terminate the treaties because they were never in effect. The negotiation with Britain was political rather than legal. Lawrence A. Castle, Comment, *The Reversion of Hong Kong to China: Legal and Practical Questions*, 21 WILLAMETTE L. REV. 327, 328-33 (1985).

12. Jackson, *supra* note 8, at 380 (citing Davies, *How Britain Fell for the Peking Game Plan*, FAR E. ECON. REV., June 21, 1984, at 44).

13. For a detailed account of how Hong Kong became a British colony, see Susan L. Karamanian, Comment, *Legal Aspects of the Sino-British Draft Agreement on the Future of Hong Kong*, 20 TEX. INT'L L.J. 167, 168-70 (1985).

14. Daniel N. Abrahamson, *Capital Punishment in Post-Colonial Hong Kong: Issues, Answers, and Options*, 24 N.Y.U. J. INT'L L. & POL. 1219, 1221 (1992).

Royal Instructions, from the British Government.¹⁵ Further, Hong Kong obtained a *ready-made* judicial system with all cases going to the Privy Council in London for final appeals.¹⁶ However, the Privy Council is a court of limited jurisdiction over Hong Kong, and it only hears cases from Hong Kong which raise new points of law.¹⁷ The Hong Kong Supreme Court retains final jurisdiction over all other cases.¹⁸ Government figures show that in the last three years the Privy Council spent seven to nine weeks each year hearing cases from Hong Kong.¹⁹

III. THE COURT OF FINAL APPEAL

A. Sources

When China resumes sovereignty over Hong Kong on July 1, 1997,²⁰ Hong Kong will become a Special Administrative Region of the People's Republic of China (HKSAR) pursuant to article 31 of the Constitution of China.²¹ For obvious reasons, the Privy Council will no longer be able to serve as the place of final adjudication for Hong Kong cases. Another body is needed to take this role.

Britain and China issued the Joint Declaration, the first formal agreement between Britain and China concerning the future of Hong Kong, in 1984.²² The Joint Declaration states that the HKSAR will be vested with "executive, legislative and independent judicial power, including that of final adjudication."²³ Further, the Joint Declaration states that "[t]he power of final judgment of the [HKSAR] shall be vested in the

15. A. Chen, *Hong Kong's "Basic Law" from the Perspective of Comparative Constitutions*, N.Z. L.J. 383, 384-85 (1989).

16. *Id.*; Frankie Fook-Lun Leung, *Hong Kong's Transition: Some Noticeable Changes*, 12 LOY. L.A. INT'L & COMP. L.J. 51, 53 (1989). The courts in the colonial era in America were also "set up by the same British colonial authorities who set up the Hong Kong Supreme Court, and colonies' final appeals went to the same Privy Council in London from the beginning in 1683 until the American Revolution in 1776." Paul Kerson, *Grounds for Appeal in China*, S. CHINA MORNING POST, Apr. 25, 1995, at 19.

17. Susan Noakes, *Final Appeal Court Assures Stable Legal System*, FIN. POST, Nov. 4, 1995, at 48.

18. *Id.*

19. *Court "To Sit Two Months A Year,"* S. CHINA MORNING POST, July 27, 1995, at 5.

20. JOINT DECLARATION OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA ON THE QUESTION OF HONG KONG, at ¶ 1, Dec. 19, 1984 [hereinafter Joint Declaration]; XIANFA [Constitution], ch. 1, art. 31 (1982) (P.R.C.).

21. *Id.*

22. Joint Declaration, *supra* note 20.

23. *Id.* at ¶ 3(3); *see id.* at annex I, § III.

court of final appeal in the [HKSAR]. . . .”²⁴ Hence, a Court of Final Appeal is to be established to replace the Privy Council.

The Joint Declaration promised that the National People’s Congress of the People’s Republic of China (NPC) would enact a Basic Law for the HKSAR.²⁵ The Basic Law intends to reflect the policies adopted by the Joint Declaration²⁶ and serve as a *miniconstitution* for the HKSAR.²⁷ Accordingly, the Basic Law, which was adopted by the Seventh NPC at its third session on April 4, 1990, also provided for the establishment of the CFA.²⁸ Similarly, the CFA is to be vested with the “power of final adjudication.”²⁹

B. Events Leading to the CFA Agreement

A Sino-British Joint Liaison Group (Joint Liaison Group) was set up pursuant to and to implement the Joint Declaration.³⁰ The Joint Liaison Group presented a proposal on the CFA to China for the first time in 1988.³¹ Before an agreement was reached, the demonstration of Chinese students in Tinnamen Square took place which climaxed with the massacre on June 4, 1989.³² The massacre substantially increased the mistrust of the people in Hong Kong towards China.³³ This feeling was, however, mutual with the Chinese Government. Alarmed by Hong Kong’s open support of the student demonstration in Tinnamen Square and severe criticism against the June 4th massacre and the defection of China’s own people to Hong Kong following the massacre, China became “apprehensive about Hong Kong becoming a subversive base against China”³⁴ Since the massacre in 1989, the “Chinese population of Hong Kong have been apathetic toward the Draft Basic Law, or anything proposed by the Beijing

24. *Id.* at annex I, § III, & 4.

25. *Id.* at ¶ 3(12) and annex I, § I, ¶ 1.

26. *Id.*

27. Abrahamson, *supra* note 14, at 1226.

28. *The Basic Law Of The Hong Kong Special Administrative Region Of The People’s Republic Of China, Adopted by the Seventh National People’s Congress at its Third Session*, Apr. 4, 1990, ch. IV, § 4, art. 81. (Apr. 4, 1997) <<http://www.cityu.edu.hk/BasicLaw/cp4-4.htm>> .

29. *Id.* at § 4, art. 82.

30. Joint Declaration, *supra* note 20, at annex III.

31. Noakes, *supra* note 17.

32. HSIN-CHI KUAN, HONG KONG AFTER THE BASIC LAW 16 (1990).

33. *Id.*

34. *Id.*

government."³⁵ This attitude certainly did not facilitate any cooperation between Britain, China, and Hong Kong. In fact, in October 1989 the NPC expelled two Hong Kong residents, Lee and Szeto Wah, from the Drafting Committee for the Basic Law because of their leading roles in supporting the democratic movement in China.³⁶ The mistrustful atmosphere continued, and it is easy to understand that the Legco would flatly reject the first draft of the CFA Bill in 1991.³⁷ The rejection was grounded mainly on the Bill's allowance for only one foreign judge on the five-member CFA bench.³⁸

Legco's rejection of the first CFA agreement in 1991 brought an abrupt end to any further negotiation on the CFA issue. Indeed, in 1992 the focus of Britain and China was on the electoral reform package introduced by Governor Patten, which broadened Hong Kong's democratic system³⁹ by extending the franchise of functional constituencies to 2.7 million.⁴⁰ China responded to the legislative reform violently, accusing Patten of breaching the Joint Declaration and the Basic Law and threatening to disband the legislature elected under the reform.⁴¹ Talks broke down between Britain and China on Hong Kong's electoral reform in July 1993, which was followed by NPC's passing a resolution to disband the three tiers of government after the handover in 1994.⁴² Despite China's threat, Hong Kong's electoral reform became law the same year.⁴³ In other words, the relationship between China and Britain had been antagonistic since 1992.⁴⁴ As a result, virtually nothing took place on the CFA negotiation from 1991 through 1994.⁴⁵

35. Berry F. Hsu & Philip W. Baker, *The Spirit of Common Law in Hong Kong: The Transition to 1997*, 24 U.B.C. L. REV. 307, 313 (1990).

36. *Id.*

37. Noakes, *supra* note 17.

38. Robin Fitzsimons, *Is Hong Kong Facing a Legal Sell-out?*, TIMES (London), Aug. 1, 1995, available in 1995 WL 7687409; see Noakes, *supra* note 17.

39. Associated Press, *Britain, China Agree to Save Hong Kong's Legal System*, ARIZ. REPUBLIC, June 10, 1995, at A22.

40. *Chronology*, S. CHINA MORNING POST, Oct. 4, 1995, at 3, available in 1995 WL 7536827.

41. Associated Press, *supra* note 39.

42. *Chronology*, *supra* note 40.

43. *Id.*

44. Louise do Rosario, *Future Imperfect: Lawmakers Approve Post-1997 Court Despite Flaws*, FAR E. ECON. REV., Aug. 10, 1995, at 26.

The CFA agreement was so crucial to Hong Kong's future⁴⁶ that Britain could no longer merely react to China's threat. The CFA had to be in place. Therefore, in April 1995 Britain forced China to reopen the negotiation on the CFA by threatening to act unilaterally in the formation of the CFA.⁴⁷ The negotiation finished on May 30th,⁴⁸ and the current CFA agreement was reached in June 1995.⁴⁹ Although the CFA agreement was heavily criticized,⁵⁰ Legco passed it thirty-eight to seventeen, with five abstentions.⁵¹

C. The Agreement

The CFA Bill is long and complex, but the agreement reached in June 1995 on the CFA consisted of only five paragraphs, which aimed to clarify ambiguous or undecided points from the past. The most important aspects of the agreement are found in paragraph 3: The British side agrees to amend the Court of Final Appeal Bill to include the formulation of *acts of state* in article 19 of the Basic Law and to provide that the Court of Final Appeal Ordinance shall not come into operation before June 30, 1997.⁵² In other words, the CFA will not operate until China resumes its sovereignty of Hong Kong on July 1, 1997. Further, the CFA will be precluded from hearing cases concerning *acts of state*. The full text of the June agreement can be found in Appendix A. Although not contained in the June agreement, China's insistence on allowing only one foreign judge on the CFA was also incorporated into the CFA Bill.⁵³ In conjunction with this agreement, Governor Patten presented it to Legco for consideration.

45. Peter Stein & Marcus W. Brauchli, *London and Beijing Agree on High Court for Hong Kong*, WALL ST. J. EUR., June 12, 1995, at 2.

46. Consul General Richard W. Mueller, *America's Long-Term Interest in Hong Kong*, Transcript, Vol. 6, No. 21, ISSN: 1051-7693; May 2, 1995, DEP'T ST. DISPATCH, May 22, 1995, available in 1995 WL 8643565.

47. Noakes, *supra* note 17.

48. *Id.*

49. *Chronology*, *supra* note 40.

50. Chris Yeung et al., *Fight Not Over, says Martin Lee*, S. CHINA MORNING POST, July 27, 1995, at 1.

51. *World Politics and Policy*, *Three Singapore Leaders Awarded Record Damages in Libel Case*, ASIAN WALL ST. J., July 27, 1995, at 15, available in 1995 WL 8779320.

52. *See infra*, Appendix A, § 3.

53. Louise do Rosario, *A Court Too Far: Democrats Vow to Reject Sino-British Accord*, FAR E. ECON. REV., June 22, 1995, at 20.

The transcript of his official statement with respect to the CFA Bill and agreement is available in Appendix B.⁵⁴

IV. CONCERNS OVER THE CFA AGREEMENT

A. *The Significance of the CFA in Hong Kong's Future*

The Basic Law guarantees that HKSAR will "exercise a high degree of autonomy . . . and independent judicial power."⁵⁵ The legal system of HKSAR will, to a large extent, decide the degree of autonomy HKSAR will enjoy as a part of China.⁵⁶ The CFA is the center of the legal system in Hong Kong. Whether Hong Kong will truly be vested with the final adjudication power as stated in the Basic Law will depend on the independence and jurisdiction of the CFA.⁵⁷ In addition, the independence of the CFA is paramount to the continuation of the rule of law in HKSAR.⁵⁸ Hong Kong's success has been based on its fair, efficient, and independent legal system under which businesses flourish.⁵⁹ Business has come to Hong Kong because of its legal system and the rule of law.⁶⁰ Indeed, Senator Craig Thomas warned that if the rule of law were to give way to "family or party connections," businesses will become "skittish and pull out."⁶¹ If Hong Kong were to remain as a world's leading financial center, the rule of law must continue to exist⁶² because:

business people must be able to rely on the courts' upholding the sanctity of contracts and on the impartial enforcement of commercial laws and regulations. In this connection, the establishment of a court of final appeal

54. Governor Patten's statement contains succinct accounts of the difficulties on reaching the CFA agreement and the official views and explanatory notes with respect to the CFA agreement.

55. *The Basic Law Of The Hong Kong Special Administrative Region Of The People's Republic Of China, Adopted by the Seventh National People's Congress at its Third Session*, Apr. 4, 1990, ch. I, art. 2. (Apr. 1, 1997) <<http://www.cityu.edu.hk/BasicLaw/cp1.htm>>.

56. Jackson, *supra* note 8, at 381.

57. *The Basic Law Of The Hong Kong Special Administrative Region Of The People's Republic Of China, Adopted by the Seventh National People's Congress at its Third Session*, Apr. 4, 1990, ch. I, art. 2. (Apr. 1, 1997) <<http://www.cityu.edu.hk/BasicLaw/cp1.htm>>.

58. Hsu & Baker, *supra* note 35, at 329-31.

59. Johannes Chan, *A Bill of Rights for Hong Kong*, in *CIVIL LIBERTIES IN HONG KONG* 72, 87 (Raymond Wacks ed., 1988); see Louis Kraar, *The Death of Hong Kong*, *FORTUNE*, June 26, 1995, at 118.

60. Editorial, *Courting Disaster: Britain and China Agree on Court of Not-Quite-Final Appeal*, *FAR E. ECON. REV.*, June 22, 1995, at 5.

61. Louise do Rosario, *Courting Disaster?*, *FAR E. ECON. REV.*, July 6, 1995, at 61.

62. Mueller, *supra* note 46.

before 1997 would be a crucial step in maintaining confidence in Hong Kong's ability to operate an effective legal system after the transition and to avoid damaging legal gaps.⁶³ Even the public at large is concerned with the continuation of the rule of law. People . . . must feel secure about the protection of their basic rights. People who look over their shoulder for fear of arbitrary arrest or detention, or who fear they cannot get a fair trial in the event they are charged with an offense, are not the kind of people who built Hong Kong.⁶⁴

Therefore, unlike other issues relating to the reversion of Hong Kong in 1997, the CFA issue directly affects the future existence of the rule of law in Hong Kong, which is determinative of Hong Kong's continued prosperity after 1997.

Since so much is at stake on the CFA, its formation is closely scrutinized by anyone who has interests in Hong Kong's future. The concerns over the CFA agreement are primarily in three areas:

- 1) the exclusion of the CFA's jurisdiction over *acts of state* and the ambiguity of what constitutes *acts of state*;
- 2) the scheduled date of the opening of the CFA on July 1, 1997, the date on which China assumes sovereignty over Hong Kong;
- 3) the permission of only one foreign judge sitting on the five-member CFA bench.⁶⁵

B. *Acts of State*

The June agreement on the CFA explicitly precludes the CFA from hearing cases concerning *acts of states*⁶⁶ by incorporating article 19 of the Basic Law. Article 19 consists of three arguably inconsistent paragraphs.⁶⁷ The first paragraph grants HKSAR the power of final

63. *Id.*

64. *Id.*

65. Fitzsimons, *supra* note 38.

66. *See infra*, Appendix A.

67. The full text of art. 19 of the BASIC LAW is:

The [HKSAR] shall be vested with independent judicial power, including that of final adjudication.

The courts of the [HKSAR] shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.

The courts of the [HKSAR] shall have no jurisdiction over acts of state such as defense and foreign affairs. The courts of the Region shall obtain a certificate from the Chief

adjudication. The second paragraph authorizes HKSAR to hear "all cases in the Region."⁶⁸ However, HKSAR courts, including the CFA, cannot hear cases for which they have not had jurisdiction under the British rule. Conceptually, such limitation could take away the HKSAR's final adjudication power after 1997 because the Privy Council in London possesses the power of final adjudication for Hong Kong cases. Further, *all cases* does not really mean all cases. Paragraph 3 explains that HKSAR "shall have no jurisdiction over acts of state such as defense and foreign affairs."⁶⁹

The Joint Declaration contains a similar phrase: "[t]he [HKSAR] will enjoy a high degree of autonomy except in foreign and defense affairs which are the responsibilities of the Central People's Government."⁷⁰ However, the Joint Declaration does not qualify the meaning of final adjudication when mentioning the CFA in the HKSAR. In this respect, the Basic Law is not true to the spirit manifested in the Joint Declaration. Conversely, it could be argued that the provision in the Basic Law on limiting the CFA's jurisdiction outside acts of state is consistent with the Joint Declaration because the phrase "foreign and defense affairs" in the Joint Declaration modifies the entire administration of the HKSAR, thus including the CFA. These two polar interpretations on whether the CFA agreement is in harmony with the Joint Declaration and the Basic Law are evident in the attitudes of the supporters⁷¹ and opposers⁷² of the CFA agreement.

Entrusting China with the responsibilities of handling defense and foreign affairs of Hong Kong is actually common in autonomous

Executive on questions of fact concerning acts of state such as defense and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.

The Basic Law Of The Hong Kong Special Administrative Region Of The People's Republic Of China, Adopted by the Seventh National People's Congress at its Third Session, Apr. 4, 1990, ch. II, art. 19, (Apr. 1, 1997) <<http://www.cityu.edu.hk/BasicLaw/cp2.htm>> .

68. *Id.*

69. *Id.*

70. Joint Declaration, *supra* note 20, ¶ 3(2).

71. Hong Kong Attorney General Jeremy Matthews claimed that the CFA's jurisdictional limitations on acts of state should not be considered a concession because the CFA agreement merely reflects what is already in the Basic Law, noting: "It is strange that when we propose to align the court on this point with the Basic Law, we are accused of kowtowing. But when others propose to amend the bill to align it with the Joint Declaration and the Basic Law then that becomes a matter of principle." *Matthews Strikes at Opposition*, S. CHINA MORNING POST, June 15, 1995, at 6.

72. Michael C. Davis, *A Common Law Court in a Marxist Country: The Case for Judicial Review in the Hong Kong SAR*, 16 DENV. J. INT'L L. & POL'Y 1, 4 (1987).

arrangements.⁷³ However, excluding the CFA from hearing cases concerning acts of states without clearly defining the scope of acts of state is disturbing. *Act of state* is not defined in the Basic Law. The words *defense* and *foreign affairs* do not define acts of state but merely give examples to what may be acts of state. But what else may be considered acts of state by the Chinese government? Acts of state in common law "typically relate to the making of treaties with foreign countries, declarations of war, and the seizure of land or goods in right of conquest."⁷⁴ Attempts to amend the CFA Bill to restrict acts of state to its common law definition were unsuccessful.⁷⁵ Therefore, the bottom line is that CFA cannot hear cases on acts of state, but no one is sure what that means.

The potential problems with a loose definition of acts of state are alarming. The United Nations recently warned that the ambiguity of acts of state may give China the chance to curtail the CFA's power.⁷⁶ In fact, the entire judiciary of HKSAR will be affected.⁷⁷ Acts of state could mean different things on any given occasion. Even worse is that the power of interpretation of the Basic Law, including the meaning of acts of state, ostensibly rests in the hands of the Standing Committee of the NPC.⁷⁸ Will China deem the following events *acts of state*:

73. Roda Mushkat, *Hong Kong as an International Legal Person*, 6 EMORY INT'L L. REV. 105, 138 (1992).

74. Simon Holberton, *Hong Kong Law Under Chinese Law: The Interface Between Basic and Common Law*, FIN. TIMES, June 12, 1995, at 3; see Frank Ching, *Agreement on Court of Final Appeal Raises New Questions*, FAR E. ECON. REV., June 29, 1995, at 36.

75. *Clause Raises Worries on Human Rights after '97*, S. CHINA MORNING POST, July 27, 1995, at 5.

76. Bruce Gilley, *Hold your Ground: Colony Protests at China's Efforts to Trim Bill of Rights*, FAR E. ECON. REV., Nov. 16, 1995 at 36.

77. Mushkat, *supra* note 73, at 138.

78. *The Basic Law Of The Hong Kong Special Administrative Region Of The People's Republic Of China, Adopted by the Seventh National People's Congress at its Third Session*, Apr. 4, 1990, ch. VIII, art. 158. (Apr. 1, 1997) <<http://www.cityu.edu.hk/BasicLaw/cp8.htm>>.

The Chinese Constitution of 1982 does not subscribe to the concept of separation of powers. Instead, all powers are unified in the NPC. The Central People's Government and the Judiciary are formed by and accountable to the NPC. The NPC, however, meets only once a year for a few days and its great size makes it unwieldy. Thus, its Standing Committee has assumed all practical importance. It enjoys exclusive right to interpret the Constitution and the laws and shares with the NPC the right to supervise the implementation of the constitution. It can also enact laws not specifically reserved for the NPC. When the NPC is not in session, the Standing Committee approves plans and government budgets, appoints and removes ministerial personnel and decides on the composition of the National Military Commission, upon the recommendation of its chairman. KUAN, *supra* note 32, at 4.

- 1) The suppression of protest or the arrest of dissidents;⁷⁹
- 2) a commercial dispute involving a state-owned enterprise such as the Bank of China;⁸⁰
- 3) any allegedly unlawful acts committed by China's State Security Ministry officials in HKSAR;⁸¹
- 4) taking of land by the People's Liberation Army?⁸²

The list can go on. In fact, it has been suggested that the meaning of acts of state is simply going to be a variable after 1997; China's attitudes and interpretations towards acts of state "will depend on the political situation in Hong Kong at the time, the degree of confidence Beijing has in the Chief Executive, and the nature of cases coming before the courts."⁸³ These uncertainties, however, are unacceptable in the rule of law system because, "the legal system which exemplifies or proclaims the Rule of Law as an ideal is characterized by its neutrality, rationality, formality, impartiality, and impersonality: a government of laws, not of men, of rules rather than discretion, of preordained result in preference to intuitive justice."⁸⁴

Further, the role of the Chief Executive⁸⁵ in the interpretation of acts of state is questionable. Article 19 directs the HKSAR courts to obtain a binding certificate from the Chief Executive on questions of fact concerning acts of state such as defense and foreign affairs whenever such questions arise in the adjudication of cases. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Chinese Government.⁸⁶ Why will the future HKSAR courts need to obtain a *questions of fact* certificate from the Chief Executive where the current judicial practice is for the courts themselves to decide whether they have

79. Holberston, *supra* note 74, at 36.

80. Connie Law, *Appeal Court Deal Salvaged*, S. CHINA MORNING POST, June 27, 1995, at 2.

81. Holbertson, *supra* note 74.

82. *Id.*

83. Holberton, *supra* note 74, at 3.

84. Peter Wesley-Smith, *Protecting Human Rights in Hong Kong*, in HUMAN RIGHTS IN HONG KONG 17, 19 (Raymond Wacks ed., 1992). Professor Smith qualifies the meaning of the rule of law in terms of six overlapping principles, which are reprinted in full text in Appendix C.

85. The Chief Executive will be the head of the HKSAR. Appointed by the Chinese Government, the Chief Executive will serve in a similar capacity like the British Governor today. *The Basic Law Of The Hong Kong Special Administrative Region Of The People's Republic Of China, Adopted by the Seventh National People's Congress at its Third Session*, Apr. 4, 1990, ch. IV, § 1, art. 43-58. (Apr. 1, 1997) <<http://www.cityu.edu.hk/BasicLaw/cp4-1.htm>>.

86. *See supra* note 66.

subject matter jurisdiction?⁸⁷ And what is the function of this *questions of fact* certificate which the Chief Executive cannot issue without first consulting with the Chinese Government? Responding to the accusations that such a certificate will subject the CFA's jurisdiction under the arbitrary decisions of the Chief Executive, the Hong Kong Attorney General explains that this certificate "relates only to facts, not the interpretation of what is or is not an act of state."⁸⁸

This argument is unpersuasive for two reasons. First, the effects for the Chief Executive to issue a certificate on purely questions of facts may well be the same as one on questions of law with respect to the jurisdiction of the CFA. This is because the statement of facts of a case can be so phrased that it will lead itself into a conclusion of the law. For example, if the Bank of China is sued for breach of contract, it is within the Chief Executive's power to issue a certificate of facts stating that the Bank of China acts in this particular case strictly as an agent of China, thus rendering the action an act of state. Similarly,

it is not difficult to imagine that many cases touching the powers of the post-1997 Hong Kong Government will be said to concern its relationship with the central authorities in Peking. If that were claimed, no one could dispute it; for it is a question of fact on which . . . the CFA must obtain a certificate from the Chief Executive.⁸⁹

Secondly, the only place where the Basic Law addresses the scope of the acts of state is in article 19. If the Chief Executive does not decide what acts of state are, who does? It cannot be the CFA itself because its decisions are not final since the court is bound by the *question of fact certificate*. Therefore, the most logical reading of article 19 is that it gives the decision of what constitutes acts of state to the Chief Executive, whose decisions are contingent upon China's approval, noting again that the NPC has the ultimate power to interpret the Basic Law.⁹⁰ Therefore, it seems apparent that by agreeing to incorporate article 19 into the CFA agreement, Britain has given to the Chief Executive and China control over the jurisdiction of the CFA.

87. Mushkat, *supra* note 73.

88. Jeremy Matthews, Letter to Ed., *Hong Kong Rule of Law*, TIMES (London), July 25, 1995, available in 1995 WL 7686246.

89. Geoffrey Lewis, Letter to Ed., *Hong Kong Rule of Law*, TIMES (London), Aug. 14, 1995, available in 1995 WL 7690169.

90. *The Basic Law Of The Hong Kong Special Administrative Region Of The People's Republic Of China, Adopted by the Seventh National People's Congress at its Third Session*, Apr. 4, 1990, ch. VIII, art. 158. (Apr. 1, 1997) <<http://www.cityu.edu.hk/BasicLaw/cp8.htm>> .

Encircled by these limitations, is the CFA really a misnomer? More importantly, has the rule of law been lost in the future HKSAR over the CFA agreement? Lee believes it has.⁹¹ He considers that "Britain has handed China a more effective and less obvious tool for manipulating [Hong Kong's] legal system before the verdict, when political authorities . . . [NPC] may decide which cases involve *acts of state* and are thus out of judicial bounds."⁹²

Perhaps it is not this uncommon at all for the central government to have final jurisdiction on certain issues over its autonomous entities.⁹³ "When appropriately constrained, this jurisdiction does not inevitably threaten the judiciary's right of final adjudication."⁹⁴ However, as noted above, the language of the CFA agreement certainly does not appropriately constrain China in its exercise over the meanings of acts of state. Will China voluntarily constrain itself and not abuse its power? Lee does not count on it.⁹⁵ If the CFA were to begin hearing cases prior to the transition, it may help shape the interpretation of acts of state under British rule and set up some precedents. However, this is out of the question now as the CFA is scheduled to begin operation on July 1, 1997.

C. CFA to Start on July 1, 1997

The CFA is scheduled to begin operation on the first day China resumes sovereignty over Hong Kong. However, the target date for the establishment of the CFA was at one time in 1992.⁹⁶ Although this proved to be impossible when Legco rejected the first CFA agreement in 1991,⁹⁷ at the time Britain and China reached the CFA agreement in June 1995, they could have arguably scheduled to open the CFA before the reversion. Why did they not?

The judicial development in Hong Kong before China resumes sovereignty is vital to the "successful maintenance of the common law judicial system."⁹⁸ Establishing the CFA before July 1, 1997, would have allowed the court to gain precious experience and avoid any potential

91. Jonathan Mirsky, *Hong Kong QC Defies China Ban*, TIMES (London), Aug. 15, 1995, available in 1995 WL 7690312.

92. Lee, *supra* note 1.

93. Brian Z. Tamanahah, *Post-1997 Hong Kong: A Comparative Study of the Meaning of "High Degree of Autonomy"*, 20 CAL. W. INT'L L.J. 41, 54-55 (1989).

94. *Id.*

95. Lee, *supra* note 1.

96. Leung, *supra* note 16.

97. Noakes, *supra* note 17.

98. Hsu and Baker, *supra* note 35, at 308.

problem for legal vacuum. More importantly, the early establishment of the CFA could ensure a strong legal framework ready to take Hong Kong through the transition and minimize China's opportunity to meddle with the CFA.⁹⁹ Hong Kong government officials' desire to set up the CFA before 1997 was nearly unanimous even days before reaching the CFA agreement with China.¹⁰⁰ The CFA agreement thus evidences an important compromise on Britain's part.

The choice of setting up the court in July 1997 is poor. Even over the controversial issue concerning acts of state, one can still find positive reviews of the issue. However, not a single article or comment exists which compliments the choice of July 1, 1997, as the date on which the CFA will start hearing cases. To the contrary, some consider "Britain's biggest failure in the talks was its inability to convince China to allow the court to be set up before 1997."¹⁰¹ Some criticize that if Britain were to make concession after concession over the CFA issue, it should have at least insisted on setting up the CFA while it is still in power, thus ensuring its proper formation.¹⁰²

It has been reported that China requested the CFA be set up after it has regained sovereignty over Hong Kong.¹⁰³ China wants to be seen as the party who bestows judicial independence on the HKSAR.¹⁰⁴ As much as Britain wanted to set up the CFA prior to 1997 so that it would have time to observe its operation or even mold its shape to its liking, China, probably for the same reasons, resisted an early establishment of the CFA.¹⁰⁵ "From Beijing's point of view, it did not design a way of keeping Hong Kong's court system on a tight leash only to let Mr. Patten – not their favorite governor – introduce some slack into the system just before the handover of sovereignty."¹⁰⁶

It is not difficult to imagine that China might have deliberately delayed the establishment of the CFA in order to increase its control over it. China spent 1993 getting upset at the electoral reform introduced by

99. *Id.*

100. *What They Said Before*, S. CHINA MORNING POST, June 10, 1995, at 3.

101. Holberton, *supra* note 74, at 3.

102. Connie Law & Catherine Ng, *Legal Profession*, S. CHINA MORNING POST, June 10, 1995, at 3.

103. Graham Hutchings, *International: Hong Kong Rages Against New Court*, SUNDAY TELEGRAPH LONDON, June 11, 1995, at 25.

104. *Id.*

105. Holberton, *supra* note 74, at 3.

106. *Id.*

Governor Patten and refused to consider the CFA issue in most of 1994.¹⁰⁷ July 1, 1997, can arguably be a logical date for the CFA to start operating since the Privy Council will stop hearing cases from Hong Kong on June 30, 1997.¹⁰⁸ However, if there are aspects of the CFA which are inconsistent with the agreement and the Basic Law, could one rely solely on the good faith of China to make any needed correction? It is anybody's guess now.

D. The Four To One Formula

Both the Joint Declaration and the Basic Law allow the CFA to invite "judges from other common law jurisdictions to sit on the [CFA]." ¹⁰⁹ Legco rejected the 1991 CFA agreement largely because it allowed only one foreign judge to be on the CFA bench.¹¹⁰ However, the June 1995 CFA agreement mirrored that of 1991 in the ratio of judges for the CFA: "[The CFA] would consist in each sitting of the Chief Justice, three permanent Hong Kong judges and one non-permanent judge, who could be from Hong Kong or from another common law jurisdiction. The permanent and non-permanent Hong Kong judges could be either local or expatriate."¹¹¹ The Chief Justice of the CFA must be a Chinese citizen who is a permanent HKSAR resident with no right of abode in any foreign country.¹¹²

There are primarily three concerns over allowing only one foreign judge in the CFA. First, the Joint Declaration and the Basic Law allow the invitation of *judges* to sit on the bench. The plural form is indicative of more than just one. Therefore, the CFA agreement's limitation of only one judge is allegedly in violation of the Joint Declaration and the Basic Law.¹¹³ Secondly, the reason for appointing a foreign judge in the CFA is to increase CFA's independence.¹¹⁴ The more foreign judges on the bench,

107. Fitzsimons, *supra* note 38.

108. See No Kwai-Yan, *Pledge on Handover of Appeals*, S. CHINA MORNING POST, Aug. 17, 1995, at 4.

109. Joint Declaration, *supra* note 20, at annex I, § III, ¶ 4; *The Basic Law Of The Hong Kong Special Administrative Region Of The People's Republic Of China, Adopted by the Seventh National People's Congress at its Third Session*, Apr. 4, 1990, ch. IV, § 4, art. 82. (Apr. 1, 1997) <<http://www.cityu.edu.hk/BasicLaw/cp4-4.htm>>.

110. Fitzsimons, *supra* note 38.

111. See *infra* Appendix B.

112. *The Basic Law Of The Hong Kong Special Administrative Region Of The People's Republic Of China, Adopted by the Seventh National People's Congress at its Third Session*, Apr. 4, 1990, ch. IV, § 4, art. 90. (Apr. 1, 1997) <<http://www.cityu.edu.hk/BasicLaw/cp4-4.htm>>.

113. Dick Thornburgh, *A Blow to Hong Kong's Future*, WASH. POST, July 30, 1995, at C9.

114. Rosario, *supra* note 53, at 20.

the more resistant the CFA will be against China's influence.¹¹⁵ Thirdly, limiting the bench to only one foreign judge also means that four judges must be chosen from a limited pool of judges "potentially susceptible to Chinese government influence" and thereby compromising the independence and efficiency of the CFA.¹¹⁶ Some worry that Hong Kong does not "have enough legal talent available to give the court the stature it needs to win the confidence of international investors."¹¹⁷ In addition, despite the criteria listed in the Joint Declaration which states that "judges shall be chosen by reference to their judicial qualities,"¹¹⁸ China has already expressed its desire to pick judges "for their political reliability rather than their knowledge of colonial laws."¹¹⁹

It is important to note that only the Chief Justice needs to be Hong Kong Chinese. The three other permanent judges may be of any nationality.¹²⁰ Further, article 92 of the Basic Law authorizes recruiting of even permanent judges from other common law jurisdiction. Consequently, it is possible to have a CFA bench consisting of only one Hong Kong Chinese (the Chief Justice), three British expatriate permanent judges, and a foreign non-permanent judge. On the other hand, all five members of the bench may be of Chinese ancestry. Therefore, the combination of the CFA is actually quite flexible. It is somewhat remarkable that China would let any foreign judge be on the bench at all because "China believes allowing the court to be transposed from London to Hong Kong rather than to Beijing, and allowing any foreigner at all to sit on the bench, are major concessions of Chinese sovereignty."¹²¹ Given these considerations, the limitation of only one foreign judge on the CFA bench is perhaps not unreasonable.¹²²

It is beyond dispute that the quality of the CFA bench controls the independence of the CFA.¹²³ The permission to allow expatriates to be permanent judges in the CFA offers reasonable safeguards to their qualities

115. Thornburgh, *supra* note 113, at C9.

116. Rosario, *supra* note 44, at 26.

117. Mike Steinberger, *Companies Ring-Fence Assets in Hong Kong Twilight Raid*, TIME (London), Aug. 4, 1995, available in 1995 WL 7688478.

118. Joint Declaration, *supra* note 20, at annex I, § III, & 3.

119. Gilley, *supra* note 76, at 36.

120. Noakes, *supra* note 17, at 48.

121. Wing Kay Po, *The Sound and the Fury of the Court of Final Appeal*, E. EXPRESS, May 3, 1995, at 15.

122. Fitzsimons, *supra* note 38.

123. Wai-Kong Fung, *Legal Councillor in Neutral Stance*, S. CHINA MORNING POST, Sept. 28, 1995, at 6.

and impartiality. On the five-member bench, unless there are three or more foreign justices coming from other jurisdictions not susceptible to China's influence, there is a potential that the CFA is under, even indirectly, the influence of China. In this limited sense, the CFA is never sure to be totally neutral. China obviously will not allow more than one foreign judge to be in the CFA, let alone three. Since the HKSAR will after all be a part of China, and the CFA will be the highest court in the region, China's concession of allowing one foreign judge on the CFA bench is not entirely unjustified. Arguing in favor of the combination of the CFA, Commissioner Wiggham of Hong Kong Economic & Trade Affairs questioned: "[c]an you imagine a law requiring a foreigner on the U.S. Supreme Court?"¹²⁴ Although the analogy is not completely correct, the argument may be applicable with respect to the CFA.

E. China Dropped Demand on Post-Verdict Remedial Mechanism

Britain claimed that China also made compromises on the CFA agreement. China had insisted on the CFA agreement giving the Chief Executive the power to overturn CFA decisions, although this would have been in violation of both the letter and spirit of the Joint Declaration and the Basic Law.¹²⁵ China had wanted this *post verdict remedial mechanism* based on the fear that the CFA might render *erroneous* decisions which would leave it with no recourse.

The June CFA agreement addressed this issue in paragraph 2, which reads:

[t]he Chinese side agrees to the British side amending the Court of Final Appeal Bill to make it clear that Section 83P of the Criminal Procedure Ordinance applies in a case where an appeal has been heard and determined by the Court of Final Appeal, and that there is therefore no need for further legislative or other provisions in relation to the power to inquire into the constitutionality of laws or to provide for post-verdict remedial mechanisms.¹²⁶

Applying section 83P of the Criminal Procedure Ordinance to the CFA means that the Chief Executive may direct the CFA to retry a case upon

124. Wiggham, *supra* note 7, at A16.

125. *China's Day in Court*, TIMES (London), June 10, 1995, at 18, available in 1995 WL 7674680.

126. See *infra*, Appendix A.

receiving new and relevant evidence.¹²⁷ This provision is a lesser evil than granting the Chief Executive an outright power to overturn CFA cases, but it nonetheless leaves the door ajar for interference from the Chief Executive.¹²⁸ The comforting thoughts are that the Chief Executive's power to reopen cases under this provision is limited to only criminal cases and contingent upon the discovery of new and relevant evidence. Lee did not consider the dropping of the post-verdict remedial mechanism as a concession for China because such mechanism was unnecessary in light of the CFA agreement; China has already gained the power to remove any cases from the jurisdiction of the CFA before the verdict under the acts of state clause.¹²⁹ Lee's positions may be extreme but are valid interpretations of the CFA agreement.

V. THE DEGREE OF INDEPENDENCE OF THE CFA AND THE SURVIVAL OF RULE OF LAW IN HONG KONG

The CFA agreement has concluded, and Britain and China are on their way to organizing the court. Will the CFA be able to ensure the continuation of rule of law in Hong Kong? Will China refrain from interfering with the decisions of the CFA given the holes in the CFA agreement? The author proposes to answer these questions by examining China's internal and external restraints on exercising controls over the CFA.

A. *China's Internal Restraint – its Respect for Rule of Law*

Rule of law, as the contemporary world knows it, was not a prominent part of Chinese history. In fact, "part of China's tradition includes a hostility to law and to lawyers."¹³⁰ The Confucians believed that people ought to govern themselves "in a general code of morality and ritual and strongly opposed publicly promulgated laws."¹³¹ In conjunction with this sentiment towards law, China was, for a long time, ruled by emperors. The emperors and their officials, without exception, had "an absolute right to rule and the people were under an absolute obligation to obey. There was no conception of government powers being limited by

127. No Kwai-Yan & Quinton Chan, *Jurisdiction*, S. CHINA MORNING POST, June 10, 1995, at 3.

128. *Id.*

129. Lee, *supra* note 1, at 10.

130. Michael H. Armacost, *The People's Republic of China: Economic Reform, Modernization and the Law*, 3 CHINA L. REP. 153, 157 (1986).

131. *Id.*

law"¹³² Law was only viewed as the means of "dealing with crime and punishment"¹³³

Today's Communist Chinese attitudes concerning the rule of law do not deviate substantially from its Confucian tradition. The Central Government controls all phases of the country's operation, and every person and organization must obey the centralized leadership of the Communist Party.¹³⁴ Appointed government officials often assume both the executive and judicial roles.¹³⁵ The law, including the Chinese Constitution, is malleable by the leaders and subject to change at any given time.¹³⁶ Important policies can be made in China absent any statutory authorities.¹³⁷ Although the development of the Chinese legal system has been remarkable and rapid,¹³⁸ the legal system is still only developing.¹³⁹ Some judges in China can still be bought.¹⁴⁰ Chinese courts that are supposedly independent are not really independent because of the "complete and well-entrenched executive bureaucracy" and "an incomplete and tentative legal system."¹⁴¹ Additionally, there are those who stand to lose under rule of law because the current state of law in China allows them to "punish political dissenters, intimidate critics, take care of their friends and enrich their families without fear of lawsuits."¹⁴² Rule of law, therefore, is not a concept commonly practiced in China.

132. Albert H. Y. Chen, *Civil Liberties in China: Some Preliminary Observations*, in *CIVIL LIBERTIES IN HONG KONG* 107, 108 (Raymond Wacks ed., 1988).

133. *Id.* at 109.

134. A BASIC UNDERSTANDING OF THE COMMUNIST PARTY OF CHINA 71 (Norman Bethne Institute trans., 1976).

135. Armacost, *supra* note 130, at 158.

136. David A. Jones, Jr., *A Leg to Stand On? Post-1997 Hong Kong Courts as a Constraint on PRC Abridgment of Individual Rights and Local Autonomy*, 12 *YALE J. INT'L L.* 250, 265-66 (1987); Editorial, *Whose Law in Hong Kong*, *WASH. POST*, June 12, 1995, at A18.

137. For example:

[t]he fact that Deng Xiaoping is the highest decision-maker in China today cannot be derived from the constitution of the PRC. And the crucial decision to suppress the students' prodemocracy movement of April-June 1989 was not in reality made by any of the state organs provided for in the constitution.

Chen, *supra* note 15, at 384.

138. See Gan Chongdou, *Open Policy Updates China's Legal System*, 3 *CHINA L. REP.* 163, 163 (1986).

139. Jamie P. Horsley, *Comments on Laws and Legal Developments Affecting Foreign Investment in China*, 3 *CHINA L. REP.* 175, 176 (1986).

140. Noakes, *supra* note 17, at 48.

141. Stephen G. Wood & Liu Chong, *China's Administrative Procedure Law: An English Translation with Comments*, 43 *ADMIN. L. REV.* 89, 93 (1991).

142. Jones, *supra* note 136, at A18.

What do all these mean to the CFA and the rule of law in HKSAR? First, it is very unusual for the centralized Chinese Government to grant so much autonomous power to a region, as Hong Kong will soon enjoy. "One country, two systems"¹⁴³ is a novel idea that poses a certain degree of threats to some leaders in China.¹⁴⁴ Not everyone in China was happy about the Joint Declaration and how the reversion of Hong Kong would take place.¹⁴⁵ Ji Pengfei¹⁴⁶ understood these China's concerns. When he presented the Draft Basic Law to the NPC in 1990, he carefully explained the decision of vesting the HKSAR with the power of final adjudication;

[t]he draft vests the courts of the [HKSAR] with independent judicial power, including that of final adjudication. This is certainly a very special situation wherein courts in a local administrative region enjoy the power of final adjudication. Nevertheless, in view of the fact that Hong Kong will practice social and legal systems different from the mainland's, this provision is necessary.¹⁴⁷

Will China be content with the power that it has given to Hong Kong? Keeping in mind that the Chinese government can easily bypass its own law to achieve its objectives in China, one could imagine it must be tempting for China, after 1997, to exert its power over the HKSAR and taint the rule of law system so carefully preserved by the Basic Law.

Secondly, it is natural to equate the Basic Law as Hong Kong's mini-constitution.¹⁴⁸ However, it is a bad idea if China does so. China views its constitutions differently from the west. Instead of treating its constitutions as the "embodiments of unchanging principles binding on the government," China has changed its constitutions frequently since the PRC was formed.¹⁴⁹ Therefore, it is more accurate to characterize these

143. *The Basic Law Of The Hong Kong Special Administrative Region Of The People's Republic Of China, Adopted by the Seventh National People's Congress at its Third Session*, Apr. 4, 1990, preamble. (Apr. 1, 1997) <<http://www.cityu.edu.hk/BasicLaw/preamble.htm>>.

144. Jones, *supra* note 136, at A18.

145. Hsu & Baker, *supra* note 35, at 321-22.

146. Chairman of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

147. BASIC LAW, *supra* note 28, at App. (*Explanations on "The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft)" and Its Related Documents*, Mar. 28, 1990, at 71, 79).

148. See Abrahamson, *supra* note 14.

149. Jones, *supra* note 136, at 265-66.

documents as "descriptions of prevailing policy aspirations."¹⁵⁰ China's cavalier attitude towards its constitutions is reflective of its treatment to rule of law. Therefore, as the CFA agreement has incorporated article 19 of the Basic Law, the CFA agreement can be modified by amending the Basic Law, which is within the power of the NPC.¹⁵¹ Although the Basic Law states that "[n]o amendment to this Law shall contravene the established basic policies of the [PRC] regarding Hong Kong,"¹⁵² this is really not much of a safeguard given that the Standing Committee of the NPC has the power to interpret the Basic Law.¹⁵³ For these reasons, China's internal restraint, which is its respect to rule of law, may not be sufficient to prevent it from interfering with the CFA.

B. China's External Restraint – Reactions of Business in Hong Kong and the World Towards an Ineffective CFA

China's interests in the continued prosperity of Hong Kong are substantial.¹⁵⁴ Despite Shanghai's development, Hong Kong will remain China's most important financial center after 1997.¹⁵⁵ Hong Kong serves as a gateway for foreign investment in China, and China has no rational reasons to tamper with that.¹⁵⁶ In fact, the success of China's rapid economic development depends on the support of Hong Kong.¹⁵⁷ Consequently, "[e]ven the pessimists . . . in Hong Kong don't express the fear that China will suddenly impose an iron hand on Hong Kong or seek to punish it for its success."¹⁵⁸

Business thrives under the current Hong Kong legal system. The business world responded favorably to the CFA agreement because the agreement eliminated a lot of uncertainties with respect to the post-1997

150. *Id.*

151. *The Basic Law Of The Hong Kong Special Administrative Region Of The People's Republic Of China, Adopted by the Seventh National People's Congress at its Third Session*, Apr. 4, 1990, ch. VIII, art. 159 (Apr. 1, 1997) <<http://www.cityu.edu.hk/BasicLaw/cp8.htm>>.

152. *Id.*

153. *The Basic Law Of The Hong Kong Special Administrative Region Of The People's Republic Of China, Adopted by the Seventh National People's Congress at its Third Session*, Apr. 4, 1990, ch. VIII, art. 158. (Apr. 1, 1997) <<http://www.cityu.edu.hk/BasicLaw/cp8.htm>>.

154. Sean Kennedy, *A-Plus Rating for "Goose's Golden Eggs,"* S. CHINA MORNING POST, Aug. 11, 1995, at 10.

155. Karen E. House, *Why Hong Kong Must Remain Hong Kong*, WALL ST. J., June 6, 1995, at A18.

156. *Id.*

157. Kennedy, *supra* note 154.

158. House, *supra* note 155.

judicial system in Hong Kong.¹⁵⁹ Hong Kong's credit rating raised as a result of the agreement.¹⁶⁰

However, it is evident that investors are cautious about the agreement. Since the negotiation between Britain and China began over a decade ago, 261 of the 529 listed companies in Hong Kong have shifted their legal domiciles to Bermuda and another fifty to the Cayman Islands.¹⁶¹ Both places' courts of final appeal are the Privy Council in London.¹⁶² These companies have not relocated back to Hong Kong because of the CFA agreement. Further, some companies have even attempted to bypass Hong Kong's legal system by either putting arbitration clauses in their contracts¹⁶³ or by stipulating the governing law of their contracts not be Hong Kong's nor China's.¹⁶⁴ Some believe that these companies have not lost faith in Hong Kong's future but are merely handling uncertainty in a harmless way.¹⁶⁵ However, the measures taken by these companies clearly demonstrate that they are willing and prepared to pull out of Hong Kong if it becomes necessary.

Investors are not the only group whose interests are at stake on the CFA issue. Taiwan also watches the situation closely. The way China handles Hong Kong will set a precedent for its ability to respect the rule of law and the *one country, two systems* idea.¹⁶⁶

In short, Hong Kong's prosperity and status as a financial center are crucial to China's economy. Investment may stop if investors believe that the Hong Kong legal system has become a lottery after 1997.¹⁶⁷ China knows it. In today's electronic age, money that flows into a region or country overnight can leave just as quickly.¹⁶⁸ Further, if China is serious about attracting Taiwan for reunification, its treatment towards Hong Kong will speak louder than any treaties than can be conceived. These are the external restraints faced by China in how it will handle the CFA. They are strong and very real.

159. Rosario, *supra* note 53.

160. *Id.* Kennedy, *supra* note 154.

161. Steinberger, *supra* note 117.

162. *Id.*

163. Gilley, *supra* note 76.

164. Steinberger, *supra* note 117.

165. *Id.*

166. Jones, *supra* note 136, at 264; Kennedy, *supra* note 154.

167. Lee, *supra* note 1.

168. *Id.*

VI. CONCLUSION

The CFA agreement reflects two competing interests. The Basic Law guarantees that "the socialist system and policies shall not be practiced in the [HKSAR], and the previous capitalist system and way of life shall remain unchanged for fifty years."¹⁶⁹ Therefore, it is in the interest of Hong Kong to carve out a specific and explicit CFA agreement that establishes the precise jurisdiction and power of the CFA.¹⁷⁰ On the other hand, the last thing that China wants is a CFA agreement that is too restrictive, leaving no wiggle room at all for China.¹⁷¹ China needs flexibility and the ability to interfere with the operation of the CFA "without violating its international obligations."¹⁷²

Britain considered the CFA agreement to be the best it could be under the circumstances.¹⁷³ It was either the June agreement or no agreement at all.¹⁷⁴ The CFA agreement has its weak points, but it did remove some uncertainty about Hong Kong's future judicial system and revealed how much control China really wants over the CFA. Blatant violation of the CFA agreement and the rule of law by China is unlikely because of the potential reactions from the business community and its possible far-reaching repercussions on China's own economy and the Taiwan issue.

The CFA agreement is a compromise. China has obtained the control that it needed to remove *important* cases from the jurisdiction of the CFA under the acts of state clause. It is uncertain, however, how frequently, and under what circumstances, China will exercise this power. Excess exercise of this power will render CFA's final adjudication power a nullity. However, discretion over acts of state on China's part also means there is room for negotiations and restraints. Therefore, mature and skilled diplomatic relationships and negotiation with China, ironically, may better ensure Hong Kong's continuation of rule of law.¹⁷⁵ A statement made by Alice Tai, Hong Kong Judiciary Administrator, about the CFA perhaps most succinctly captures the author's feeling towards the CFA agreement and the future rule of law of the HKSAR:

169. *The Basic Law Of The Hong Kong Special Administrative Region Of The People's Republic Of China, Adopted by the Seventh National People's Congress at its Third Session*, Apr. 4, 1990, ch. I, art. 5 (Apr. 1, 1997) <<http://www.cityu.edu.hk/BasicLaw/cp1.htm>>.

170. Cf. Jackson, *supra* note 8, at 383.

171. *Id.*

172. *Id.*

173. Rosario, *supra* note 53.

174. *Id.*

175. Armacost, *supra* note 130, at 158.

[p]redictions of a doomsday scenario after 1997 did nothing but damage . . . there were bound to be teething problems as the Judiciary adapted to changing circumstances and the setting up of the Court of Final Appeal. During these years we may well be gritting our teeth. But so long as we are confident, then our courts will mature and we will have a conduit for success . . . a certain amount of skepticism among Hong Kong people was understandable because they had the most to lose. But if there was only criticism and talk of the system of justice not working, it would lead to people becoming disheartened . . .¹⁷⁶

When Lee moved for the no-confidence vote against Governor Patten, was he really making a no-confidence vote on the future of Hong Kong? When Legco defeated the no-confidence vote and supported Governor Patten, did the Legco at the same time indirectly cast a confidence vote on the CFA and the future rule of law in Hong Kong? The author has confidence in Hong Kong's future rule of law and the CFA, not because of the CFA agreement, but because of the ability of the people in Hong Kong to turn a bad situation around and make the best out of it.

APPENDIX A

THE CFA AGREEMENT, reprinted in S. CHINA MORNING POST, June 10, 1995, at 2.

THIS is the full text signed between the senior British and Chinese representatives of the [Joint Liaison Group]:

AFTER full consultations, the two sides of the Sino-British Joint Liaison Group have reached the following agreement on the question of the Court of Final Appeal in Hong Kong:

1. The British side agrees to amend the Court of Final Appeal Bill on the basis of the eight suggestions published by the Political Affairs Sub-group of the Preliminary Working Committee of the Preparatory Committee of the Hong Kong Special Administrative Region on May 16, 1995.

2. The Chinese side agrees to the British side amending the Court of Final Appeal Bill to make it clear that Section 83P of the Criminal

176. Cliff Buddle, *Doomsayers "Hurt Faith in Legal System,"* S. CHINA MORNING POST, Sept. 24, 1995, at 4.

Procedure Ordinance applies in a case where an appeal has been heard and determined by the Court of Final Appeal, and that there is therefore no need for further legislative or other provisions in relation to the power to inquire into the constitutionality of laws or to provide for post-verdict remedial mechanisms.

3. The British side agrees to amend the Court of Final Appeal Bill to include the formulation of *acts of state* in Article 19 of the Basic Law and to provide that the Court of Final Appeal Ordinance shall not come into operation before 30 June, 1997.

4. The Chinese side agrees that, after the Chinese and British sides reach this agreement, the legislative procedures for the Court of Final Appeal Bill, on which the two sides have reached a consensus through consultation, will be taken forward immediately to enable them to be completed as soon as possible before the end of July 1995. The Chinese side will adopt a positive attitude in this regard.

5. The Chinese and British sides agree that the team designate of the Hong Kong Special Administrative Region shall, with the British side (including relevant Hong Kong Government departments) participating in the process and providing its assistance, be responsible for the preparation for the establishment of the Court of Final Appeal on 1 July, 1997 in accordance with the Basic Law and consistent with the provisions of the Court of Final Appeal Ordinance.

APPENDIX B

Statement about the Court of Final Appeal in the Legislative Council on June 9, 1995

The following is the transcript of the Governor, the Right Honorable Christopher Patten's statement about the Court of Final Appeal in the Legislative Council on June 9, 1995:

Mr. President, I would like to make a statement about the Court of Final Appeal.

Late last night, the British and Chinese experts in the Joint Liaison Group reached agreement on the establishment of the Court of Final Appeal. The agreement was signed by the Senior Representatives to the [Joint Liaison Group] at 2:30 p.m. this afternoon, following endorsement of its terms by the Executive Council this morning.

Members have before them the text of the agreement, which we are of course publishing in full. It is an agreement which I am entirely satisfied is in the interests of Hong Kong. It carries the full support of the

British, Chinese and Hong Kong Governments and I recommend it to this Council.

Accordingly, we are getting the draft Bill on the Court of Final Appeal this afternoon, and will introduce it into this Council on June 14.

Before coming to the terms of the agreement itself, let me remind Honorable Members briefly of the history of the Court of Final Appeal issue.

Both the Joint Declaration and the Basic Law provide for Hong Kong to have its own Court of Final Appeal to fill the role now performed by the Judicial Committee the Privy Council after the transfer of sovereignty on June 30, 1997. In September 1991, Britain and China reached agreement in the [Joint Liaison Group] on the early establishment of the CFA, and on its composition. It would consist in each sitting of the Chief Justice, three permanent Hong Kong judges and one non-permanent judge, who could be from Hong Kong or from another common law jurisdiction. The permanent and non-permanent Hong Kong judges could be either local or expatriate.

In December 1991, however, this Council passed a motion seeking greater flexibility in the appointment of overseas judges than was provided for in the 1991 agreement. Subsequently, the Chinese side made it clear that they were not prepared to re-negotiate the agreement or allow a CFA set up on any other basis to survive 1997. So the only effect of the Legco vote was to oblige the Hong Kong Government to delay the introduction of the CFA Bill into Legco.

We nevertheless began to draft the Bill, which Members will soon see is a long and complex one. In May 1994, we handed the draft Bill to the Chinese side for comments. The Chinese asked for expert talks in late March this year, and since then there have been four rounds, which culminated in the agreement we reached last night.

The agreement means that we can now be certain that the CFA to be set up on July 1, 1997 will be a proper Court of Final Appeal that will, subject to the Basic Law, have the same function and jurisdiction as the Judicial Committee of the Privy Council. It also means that our CFA Bill will provide the legislative basis for establishing the Court in Hong Kong on July 1, 1997. Our aim is to enact the Bill before the end of the current legislative session.

Let me now take Honorable Members through the five key points of the agreement in slightly more detail.

Point one sets out our agreement to amend the CFA Bill on the basis of the eight suggestions made by the PWC Political Affairs Sub-Group on May 16. As Honorable Members will know, we have previously agreed to incorporate most of these points into the CFA Bill.

We sought clarification from the Chinese side on the two points about which we had reservations. These were related to the procedure for appointing the Chief Justice and the question of the extension of the term of judges beyond retirement age. We are now satisfied that they are consistent with the Joint Declaration and the Basic Law.

On the first point, the Chinese side clarified that the independent Commission referred to in Article 88 of the Basic Law will be chaired by the Chief Justice after the first SAR Chief Justice has been appointed. The recommendation in respect of the appointment of the first Chief Justice will be made by the other members of the Commission. The Chief Executive will conduct this meeting of the Commission, but will take no part in making the recommendation. There is therefore no question of the independence of the Commission being undermined; and once the first Chief Justice has been appointed, the Chief Executive will have no further role in the conduct of Commission meetings.

On the second point we were concerned that the PWC suggestion that extensions of service beyond retirement age should be made by the Chief Executive in accordance with the recommendations of the Chief Justice was inconsistent with the provision in Article 88 of the Basic Law that judges should be appointed by the Chief Executive in accordance with the recommendation of the independent Commission. However, the Chinese side pointed out that there is no specific reference in the Basic Law to the procedure for extending the term of judges beyond retirement age. The fact that at present the JSC advises on these extensions is a procedure, rather than a legal requirement. So we agree that this suggestion would not be a violation of the Basic Law. The Chief Justice, in making recommendations to the Chief Executive, would of course not be precluded from seeking advice from the Commission.

Point 2 of the Agreement sets out our agreement to make a consequential amendment to the CFA Bill to put beyond doubt that section 83P of the Criminal Procedure Ordinance will also apply to an appeal which has been heard and determined by the CFA. This section provides that the Governor may refer a case to the Court of Appeal when, for example, new evidence comes to light which shows that a conviction was unsafe. It applies at present to a Hong Kong appeal which has been heard and determined by the Judicial Committee of the Privy Council.

The latter part of Point 2 of the Agreement sets out the Chinese side's agreement that there is no need for any further legislative or other provisions in relation to the power of the courts to inquire into the constitutionality of laws or to provide for post-verdict remedial mechanisms. We consider this an extremely important point, as it will ensure that the jurisdiction of the CFA will, subject to the provisions of the

Basic Law, be the same as that of the Judicial Committee of the Privy Council.

Point 3 of the agreement contains our agreement that the CFA Ordinance shall not come into operation before June 30, 1997. On this basis, we have agreed to include in the CFA Bill the formulation of *acts of state* in Article 19 of the [Basic Law], which will in any case apply as from July 1, 1997.

Point 4 is important in that it makes clear that China agrees with the CFA Bill and is content that it should be taken forward immediately. The early enactment of the CFA Bill will ensure that the CFA to be set up on July 1, 1997 will be based on the principles and practices of the Judicial Committee of the Privy Council and that it will be a genuine Court of Final Appeal.

The preparations for the setting up of the CFA on July 1, 1997 are set out in Point 5 of the Agreement. This will be undertaken by the team designated for the SAR, with the participation and assistance of the British side, including the relevant Hong Kong Government departments. The Chinese side have told us that the term team designate refers to the Chief Executive (designate) and the principal officers (designate) of the SAR Government, together with others qualified to take part in the establishment of the SAR. Once the CFA Bill has been enacted, we will be discussing with the Chinese side the modalities of this cooperation.

Honorable Members and the business community have understandably been concerned about the possibility of a judicial vacuum in the hiatus between the end of the role of the Judicial Committee of the Privy Council and the establishment of the Court of Final Appeal. This agreement will avoid any question of a judicial vacuum in 1997. It will not occur before July 1, 1997, because the Judicial Committee of the Privy Council will keep its jurisdiction to hear appeals from Hong Kong courts until June 30, 1997. We have obtained the British Government's assurance that the Privy Council will continue to hear appeals from Hong Kong up until the last possible date, and will make every effort to ensure that outstanding business from Hong Kong is dealt with before July 1, 1997. And there will not be a vacuum after July 1, 1997, because the CFA will be operational on that date, all the necessary preparations having been made beforehand. The CFA Bill contains sensible transitional provisions for any outstanding cases to be transferred from the Privy Council to the CFA. We will be discussing with the Privy Council and the team designate practical arrangements for putting these provisions into effect.

As Honorable Members know, in 1991 our aim was to establish the Court as soon as possible to give it time to build up experience before

the transfer of sovereignty. In my view it would plainly have been better had we been able to set the Court up earlier than 1997. That has always been my preference. But Members made it clear in 1991 that they did not wish to proceed on the basis of the 1991 agreement.

Until very recently, we were facing the unenviable choice of either introducing the CFA Bill into Legco without Chinese agreement and no guarantee that any Court set up as a result would survive 1997, or leaving the establishment of the Court to the [HKSAR] after July 1, 1997. The agreement we have now concluded gives us, gives this Council, the means by which we can guarantee the nature of the CFA to be set up on July 1, 1997, guarantee its establishment in accordance with a Bill passed by this Council this year, and guarantee that it will endure.

For too long there has been uncertainty about the CFA. As Honorable Members know, the people of Hong Kong and international investors want to know now how the Court will be set up, when it will be set up and what sort of Court it will be. By enacting the Bill that we will introduce next Wednesday, this Council can answer these questions.

You have before you what I believe to be a good agreement. It is an agreement which provides for a Court to be set up entirely in accordance with the Joint Declaration and the Basic Law, ready to start work on July 1, 1997. It offers the prospect of a Court that will, subject to the Basic Law, have precisely the same function and jurisdiction as the Judicial Committee of the Privy Council. It offers the certainty of continuity because the Court will be set up with unequivocal Chinese support. It offers certainty about the terms of the Court because this Council will be able to pass the necessary legislation to set those terms in concrete before the end of July. I recommend this agreement to the Council and I very much hope that Honorable Members will support the Bill when it is introduced into the Council.

APPENDIX C

Rule of Law Defined. Peter Wesley-Smith, Protecting Human Rights in Hong Kong, in HUMAN RIGHTS IN HONG KONG 17, 18-19 (Raymond Wacks ed., 1992).

The Rule of Law can be explained in terms of six overlapping principles. First legal doctrine is a formal and rational system: its precepts are self-consistent and generalized, made by persons with acknowledged lawmaking competence in accordance with a regular, open procedure. This means that the law can be described and known and acted upon independently of its political and economic context; its institutions,

its methodology, and its personnel are autonomous *vis-à-vis* other areas of social life. Law can be ascertained in an impartial manner by anyone trained in its techniques. This requires that all law is published and available and that the relationship between different types of law is settled. Judges, who ultimately identify and apply law, have very little discretion, and thus they dispense a kind of justice which can be described as formal--resulting from the regular application of pre-existing doctrine to neutrality ascertained facts--rather than substantive or intuitive. The law is therefore certain and predictable and applied equally to all persons.

Secondly, law is the antithesis of arbitrary power. It does not depend on whim or caprice but on fixed rules existing prior to conduct which is subject to their standards; it is prospective in operation, not retrospective. No person ought to be condemned by the legal system except for a breach of established law ascertained by the law's impartial tribunals, whereas the exercise of arbitrary power (that is, behavior which is indifferent to the law) can be prevented or subsequently condemned by agents of the legal system.

Thirdly, the law applies equally to all persons, whatever their social status, rank, class, political influence, physical strength, wealth, ideological commitment, race, nationality, or sex. Even government officials, lawmakers, and judges are subject to the general law in the same manner as ordinary citizens. The law is *no respecter of persons*; it is capable of being applied impartially by independent judges and officials acting in obedience to judicial and legislative commands.

Fourthly, judges are independent of political and personal pressure; their duty is to make findings of fact and to ascertain and apply the law in a neutral manner without regard to the wishes of the executive arm of government. They are experts (in the "artificial reason of the law") whose independence is institutionally guaranteed and who may review the legality of all behavior, including the fashioning of law and its execution. They may not, however, have a personal interest in proceedings; they are bound to decide in accordance with law, not personal preference. Lawyers, too, are obliged to present cases to the best of their ability, regardless of their own views as to the moral or political worth of their clients. All citizens are entitled to equal access to the legal system through remedies which relate to their rights, and to be heard, to know the allegations against them, and to have their conduct assessed by impartial judges.

Fifthly, law is capable of guiding an individual's behavior. Its purpose is to provide a measure for the conduct of human affairs, and thus it is general rather than particular, and it is published, prospective,

comprehensible, consistent, constant, fairly administered, and able to be obeyed.

Finally, law is advantageous to the individual: it stabilizes social relationships, providing a settled framework for social intercourse; it promotes order and personal security and an environment conducive to economic welfare; it respects human dignity and individual autonomy; and it ensures a reliable, predictable kind of justice. Without these virtues the systematic provision and maintenance of civil liberties would be impossible.